



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN M. HILL
ATTORNEY GENERAL**

August 9, 1976

The Honorable James T. Fitzpatrick Open Records Decision No. 137
General Counsel
University of Texas System
201 West 7th Street
Austin, Texas 78701

Re: Whether information
relating to an evaluation
of the University of Texas
System School of Nursing
is public under the Open
Records Act.

Dear Mr. Fitzpatrick:

You request our decision as to whether information relating to an evaluation of the University of Texas System School of Nursing is excepted from required public disclosure by section 3(a)(3) of the Open Records Act, article 6252-17a, V.T.C.S. This exception applies to information relating to litigation to which the state is a party and that the Attorney General has determined should be withheld from public inspection.

You also state that you consider much of the information requested to be within one or more of the exceptions contained in section 3(a)(1) (confidential by law); section 3(a)(2) (information in personnel files); section 3(a)(7) (matters prohibited from disclosure by Rules and Canons of Ethics of State Bar of Texas); section 3(a)(9) (private correspondence of elected official); and section 3(a)(11) (inter- and intra-agency memorandums).

A member of the staff of The Daily Texan requested information as follows:

Chairman of the Board of Regents Shivers has indicated to the press on several occasions that the shift of System Nursing School to component institutions has been carefully studied for at least two years.

Under the Texas Open Records Act kindly supply or make available for inspection copies of all reports, surveys, correspondence, evaluations, and comparisons with other institutions -- including correspondence from public officials of other state and local governmental agencies -- regarding the evaluation of the System School of Nursing.

This request was declined, and you requested our decision as to whether the information is excepted from disclosure.

On May 17, 1976, a lawsuit relating to the information was filed, Texas Nurses Association v. Board of Regents of The University of Texas System, Cause No. 247,716, 53rd District Court, Travis County, Texas.

You supplied 10 items which you state "are the only ones we have found which we believe may possibly be within the scope of [the] request" These items are:

1. Letter of September 12, 1974, addressed to Dr. Charles A. LeMaistre, Chancellor, UT System, from Dr. Marilyn D. Willman, President, UT System School of Nursing;
2. Memorandum from Dr. Willman to System Curriculum Committee, dated October 1, 1974;
3. Letter from Dr. Willman to Dr. LeMaistre, dated October 3, 1974;
4. Letter from Dr. LeMaistre to Dr. Willman, dated January 20, 1975;
5. Letter from Dr. Willman to Dr. LeMaistre, dated December 9, 1974;

6. Memorandum to Dr. LeMaistre from Dr. Willman, dated January 16, 1975, attaching summary of meetings held on the six campuses with representatives of clinical agencies employing UT Nursing School graduates, as well as copies of each meeting held - San Antonio, November 12, 1974; Austin, November 18, 1974; Houston, November 20, 1974; Fort Worth, November 25, 1974; El Paso, December 4, 1974; and Galveston, December 11, 1974;
7. Memorandum from Dr. LeMaistre to all Board of Regent Members dated February 4, 1975;
8. Letter from Dr. Willman to Dr. LeMaistre dated January 30, 1975;
9. "A Report On The University of Texas System School of Nursing," dated May 15, 1976; and
10. Copy of Agenda Item from the Office of the Deputy Chancellor for the Board of Regents' meeting held on March 26, 1976 concerning the System Nursing School Reorganization.

In your letter submitting this material, you stated that transcripts of tapes of conversations between Chancellor LeMaistre and Dr. Willman and others were being prepared, and that these may be within the scope of the request. You have subsequently provided us a copy of the transcript.

The section 3(a)(3) exception for information relating to litigation gives the Attorney General authority to determine whether information should be withheld from public disclosure. The attorney in this office representing the University in the pending litigation has determined that the disclosure of this information would not adversely affect the interest of the State in this litigation; therefore, we do not believe that section 3(a)(3) is applicable.

In regard to the other exceptions cited in your letter of May 28th, none are specifically addressed to any particular information, and no explanation or reason is submitted as to how or why these exceptions might apply. Furthermore, we have reviewed the information, and we find nothing in the material submitted which would invoke the applicability of the exceptions contained in sections 3(a)(1), 3(a)(2), 3(a)(7), or 3(a)(9).

Section 3(a)(11) excepts "intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency." This exemption is designed to protect from disclosure advice and recommendations on policy matters and to encourage open and frank discussion between subordinate and chief concerning administrative action. It does not extend to factual matter contained within the material. Attorney General Opinion H-436 (1974).

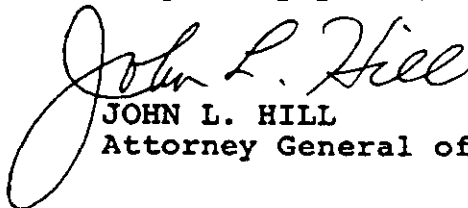
We believe that the section 3(a)(11) exception is applicable to the transcript of the September 12, 1974, meeting between Chancellor LeMaistre, President Willman of the School of Nursing and the Deans of the nursing schools. The discussion at this meeting is precisely the type of information intended to be protected from required public disclosure by section 3(a)(11). There was open and frank discussion of policy matters, just as one would expect at such a staff meeting. The transcript of this meeting is not required to be disclosed to the public. Of course, the University has discretion to disclose the information. Section 3(c).

In reference to the report dated May 15, 1976, item 9 in the listed materials, this is clearly a post-decisional document explaining the reasons why a particular policy was adopted. We have previously indicated that section 3(a)(11) is based on the similar exception in the federal Freedom of Information Act. Attorney General Opinion H-436 (1974). We are guided by the federal courts, which have drawn a clear distinction between pre-decisional and post-decisional documents, applying the federal Freedom of Information Act intra-agency memorandum exception to the former, but not the latter. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-152 (1975). We agree with the reasoning of the federal courts that the great public interest in knowing the basis for agency policy already adopted renders the intra-agency memorandum exception inapplicable to this type of information.

Another principle developed by the federal courts in interpreting and applying their intra-agency memorandum exception seems applicable in this case. That principle is that when an agency chooses to adopt or incorporate by reference an intra-agency memorandum in explaining the basis of a decision made, then the exception is waived and the information to which it referred must be made public. Any such document referred to as the basis of a decision must be disclosed unless it falls within some other exception. See NLRB v. Sears, Roebuck & Co., *supra*, at 147 and 161; American Mail Line, Ltd. v. Gulick, 411 F.2d 696, at 703 (D.C. Cir. 1969) ("If the . . . Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action."). It is our decision that any information publicly stated to be the basis of the Board of Regents' decision must be disclosed.

It is our decision that the information contained in the documents numbered 1 through 10 are not excepted from disclosure by any exception, and therefore are required to be made public. The transcript of the meeting between the Chancellor and Nursing School administrators is excepted from required public disclosure by section 3(a)(11) of the Act.

Very truly yours,


JOHN L. HILL
Attorney General of Texas

APPROVED:


DAVID M. KENDALL, First Assistant


C. ROBERT HEATH, Chairman
Opinion Committee

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